United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1905

To be argued by
JOSEPH W. RYAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

Docket No. 74-1905

P/S

UNITED STATES OF AMERICA,
Appellee,

—against—

ROBERT BOLLELLA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant Robert Bollella appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Neaher, *J.*) entered on June 28, 1974. Appellant had been charged with two counts of a four count indictment. Count One charged appellant with conspiracy to burglarize the Manufacturer's Hanover Trust Company bank at 81-21 Northern Boulevard, Queens, New York. Count Four charged that appellant wilfully and unlawfully received, concealed and had in his possession approximately $14,000 in currency which had been proceeds from the Manufacturer's burglary on December 14, 1974 in violation of 18 U.S.C. 2113(c).*

* Also charged with conspiracy as well as the burglary of the Manufacturer's bank were Salvatore Montello, Dennis Condon, John Francis Ripoll, James Vincent Santa Maria, Ronald DeConza,

[Footnote continued on following page]

Following a four week trial before a jury, appellant was found guilty on Count Four and acquitted on Count One.

On the day he was scheduled to be sentenced, September 21, 1973, Bollella filed a motion to vacate and set aside the verdict upon the following grounds: (1) the verdict was against the weight of the evidence; (2) there was a fatal variance between the proof and the indictment; (3) hearsay testimony was improperly admitted as against appellant; (4) testimony as to an admission by Bollella, taken in violation of his right to counsel, was improperly admitted; and (5) undue prejudice was created by the admission of testimony of a subsequent similar act by appellant.

Nine months later, on June 7, 1974, each one of these contentions was rejected in a 23 page memorandum decision by Judge Neaher (350A-79A).* On June 28, 1974, appellant was sentenced to three years imprisonment under the provision of 18 U.S.C. 4208(a)(2). Appellant remains free pending appeal.**

On this appeal appellant contends (1) there was a fatal variance between the indictment and the proof; (2) he was denied a fair trial in that his counsel was misled by the Government into believing the evidence of the post-arrest

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Anthony Fasanella. Robert Denisch, a Government witness, was named only as co-conspirator. Each co-defendant was convicted on Counts One, Two and Three. Their convictions were affirmed without opinion *sub nom.* on January 30, 1974, *United States* v. *Fasanella, et al.*, 490 F.2d 1406 (2d Cir.), *cert. denied,* —— U.S. —— (May 13, 1974).

* References followed by the letter "A" are to Appellant's Appendix.

**Salvatore Montello received a sentence of 7½ years imprisonment. John Francis Ripoll, James Vincent Santa Maria, Ronald DeConza and Anthony Fasanella received sentences of 5 years imprisonment. Although incarcerated, each one of these defendants presently has pending a motion for reduction of sentence. Condon received a suspended sentence after pleading guilty to Count One.

meeting between appellant and Detective Rooney was "exculpatory"; and (3) evidence of a subsequent similar act was improperly received.

Statement of the Case *

On Sunday night, December 12, 1971, the Manufacturers Hanover Trust Company bank located on Northern Boulevard, Jackson Heights, Queens County, was burglarized. Stolen from the night deposit vault was over $130,000 (308-12).

Discovery of the burglary did not occur until 8:50 A.M. on Monday morning when the bank guard and the assistant bank manager routinely inspected the bank prior to the opening of business. They discovered that in the basement of the bank a large hole had been burned through the night deposit vault, the vault alarm system had been circumvented, and a small fire had taken place during the course of the burglary. None of the physical evidence in the bank, however, gave any trace to the burglars. It was apparent that the burglary was committed in a highly sophisticated and professional manner (283-88).

Seven months later, two men confessed, on separate occasions, to their participation in the commission of the burglary. Robert Denisch, an alarm repairman and guard for Holmes Protection, Inc., confessed on July 11, 1972, after $32,000 in proceeds from another burglary had been uncovered by police officers from behind a medicine cabinet in Denisch's home (1935, 1943). One week later, on July 19, 1972, Dennis Condon, a former guard for Holmes Protection, Inc., and lifelong friend of Denisch, also confessed to

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* The transcript of the trial is over 3600 pages. On this appeal, the Government has taken the liberty of adopting portions of the brief filed in *United States* v. *Fasanella, supra.*

his participation in the Manufacturers burglary as well as several other burglaries (727-28).

Denisch and Condon agreed to fully cooperate with the Government and testify against others who had participated in the Manufacturers bank burglary under the direction of Salvatore Montello.

The Formation of the Montello Burglary Gang.

In August, 1971, Condon and Denisch, employees of the Holmes Protection Company, decided that their knowledge and experience with burglary alarm systems could be put to valuable use in committing burglaries. Since they felt incapable of successfully committing the burglaries by themselves, Condon sought people who were capable of conducting other necessary functions for the successful commission of such burglaries (326, 349-52).

In early September, 1971, at the same time Denisch and Condon were becoming associated with another burglary gang, Condon informed appellant, a long-time friend, of his activities and sought his advice. For the previous three years Condon and appellant had worked together as "bouncers" in various bars and hotels in New York City. Appellant also knew Denisch, with whom for the prior six months he had also worked together as a "bouncer". Appellant, a New York City police officer, advised Condon that he and Denisch should be "very careful" as to whom they chose to assist them in this type of activity (340-41, 347-60, 1509).

In late September, 1971, following his first burglary with another burglary gang, Condon spoke once again with appellant. He told appellant that he and Denisch were both dissatisfied with the other gang's lack of professionalism and that a recent burglary committed by them had taken too long to complete and "unnecessary chances" had been taken. Condon asked appellant for an introduction to

Salvatore Montello, whom Condon knew at that time as "Sonny Black." Appellant stated that he would try to make that introduction (460-62, 1319).

Thereafter, appellant arranged for Condon to meet appellant Montello at the Manhattan office of Monti-Turf, Inc. where Montello's brother, Louis Montello, and appellant were engaged in the business of publishing a horse race betting sheet. At the Monti-Turf office, Condon was introduced by appellant to Montello. According to Condon, this introduction went as follows: "Sonny, this is Dennis, the guy I told you about." Montello: "Is he a stand up guy?" Appellant: "He's always been a stand-up guy, always done the right thing with me" (470-72).

Condon and Montello then went out to the sidewalk where they had a discussion alone. Montello questioned Condon about his ability to circumvent burglar alarm systems and whether he had yet been successful in any burglaries. Condon explained that he and Denisch could circumvent only the Holmes' alarm system. He also described the manner in which they had done so in the recent burglary of Markel's jewelry store in Brooklyn. After hearing this, Montello stated that it "sounded all right" and that he would be in touch with Condon in the future. Prior to departing, Condon requested a $1000 loan from Montello, who replied that the request was unusual but "he would see what he could do." Montello advised Condon that any future contact between them should be made through appellant (471-74).

Following this conversation, Montello left and Condon returned to the Monti-Turf office, where Condon fully informed appellant of his conversation with Montello, including the fact that Condon had requested to become associated with Montello for the purpose of committing burglaries and that any future contact between them would be through him, appellant. With regard to Condon's request for a loan, appellant admonished Condon that the request was unwise

and unorthodox, and that it might jeopardize the relationship Condon was seeking to establish with Montello. The loan request, however, did not immediately impair the relationship sought by Condon. On the following morning Condon received a telephone call from appellant instructing Condon to proceed to the El Dorado Club on Long Island where Montello was prepared to make the loan. After receiving this call, Condon drove to the El Dorado Club where he received from Montello the $1000 loan and, for the first time met James Santa Maria and John Ripoll (475-79).

Within a day or so later, Condon again received a telephone call from appellant, who stated that Montello wanted to meet him and Denisch (480). Condon then arranged a meeting at a bar, the Turkey Inn, on Church Avenue in Brooklyn (1509).

At the Turkey Inn meeting Montello asked Denisch about his ability to defeat the Holmes alarm system. Denisch replied, "We just robbed Markel's jewelry store, which has one of the best alarm systems, and if we can rob this one, we can rob any place." Montello then told Denisch that "he had a very good crew working for him, and a good burner [and that] he himself was one of the best safe rippers in the business." When Montello stated that Denisch and Condon would split one share of proceeds from any burglary, Denisch objected and insisted that he and Condon each receive a full share. Montello acquiesced, after which they began discussing potential burglary targets. During that discussion Santa Maria and Ripoll arrived. They were introduced by Montello to Denisch and Condon as his "two partners . . . we work together" (1509-17).

The five men then left the Turkey Inn and went to look at two banks in the vicinity which had been suggested as burglary targets by Santa Maria and Ripoll. However, both banks were rejected. Montello then directed that they meet a couple of days later at a pet shop on Flatlands

Avenue, Brooklyn, where he would introduce Denisch and Condon to other members of the gang (1521-24).

Around the middle of October or the beginning of November of 1971, the final burglary team was assembled by Montello at the pet shop on Flatlands Avenue. In addition to Montello, Denisch, Condon, Santa Maria and Ripoll, two others were present: Anthony Fasanella and Ronald DeConza. The latter two were introduced by Montello to Denisch and Condon respectively as "the best burner in the business" and a "good burner." At this meeting the newly acquired talents of Denisch and Condon were discussed, and it was agreed that a burglary target should be found. Montello instructed all present to search for a likely target and meet at the pet shop in a few days (1525-29, 480-86).

The Selection of a Burglary Target.

The selection of the Manufacturers Hanover Trust Co. branch in Jackson Heights, Queens, did not take place until four weeks had elapsed following the initial meetings at the pet shop.* During that four week period several other banks and one office of the Off Track Betting Corporation had been cased by the Montello gang, and for one reason or another were rejected as burglary targets.**

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* Appellant and Louis Montello did not participate in any of these meetings leading to the burglary of the Manufacturers bank. Louis Montello, also charged in Counts One and Four, was severed from the trial due to his poor health.

** The reasons for rejecting targets demonstrate the care that the burglary gang had exercised in its preparation to commit a burglary without getting caught. The OTB office was rejected because Condon's computation of the amount of money likely on hand showed that it was not worth the risk (529-30). The National Bank of North America branch in Queens was rejected because its expansive glass walls created too great a risk of detection (535-36, 1533-36). The Dollar Savings Bank branch in the Bronx was rejected because there was too much activity in the vicinity of the bank on weekends and the old-type alarm system was to hazardous to attempt to disengage (543-44, 1550).

The burglary gang, consisting of Salvatore Montello, Condon, Denisch, Ripoll, Santa Maria, DeConza and Fasanella, perpetrated the burglary of the Manufacturer's bank on Sunday night December 14, 1971. It had been agreed that following the burglary they would proceed to the home of Louis Montello where they would divide the loot. With the exception of Condon, the burglars did proceed to the home of Louis Montello (589, 1621-23).

The Division and Distribution of the Burglary Proceeds.

Upon arriving at Louis Montello's home, Denisch, who had not previously met Louis Montello, was introduced to him by appellant Salvatore Montello. Louis Montello stated to Denisch "Nice to meet you, kid. I heard a lot about you from my brother and Bollella." Montello informed his brother Louis, that the burglary had been successful, but he added that Condon had "almost botched the whole thing up" (1625).*

On the dining room table in Louis Montello's home they opened the money bags and began counting and sorting the proceeds. When the burnt bills were set aside, Louis Montello said, "Don't worry, me and Bollella will share that." After being counted, the cash was divided into eight shares, each share amounting to over $14,000. It was agreed that Montello and appellant would divide one share (1626-28).

Denisch, who was prepared to leave with Condon's share as well as his own, was told by Montello: "It's not a good idea for [you] to carry something like $30,000 with [you] . . . [b]ecause you work for the [Holmes] company and if you get stopped how could you explain that much money on you." Montello instructed Denisch to leave most of the

* The latter remark was a reference, apparently, to the fact that Condon had carelessly disposed of a gas bottle close to the bank during the burglary (1619).

money with his brother, Louis. When Condon and Denisch needed the money it would be given to them through Bollella (1628-29).

Denisch left, taking a total of $2000 for both himself and Condon, and went to Condon's home. At Condon's home, Denisch explained to Condon the arrangements that had been made for receiving their remaining portions of their burglary shares and gave Condon $1000 of burglary proceeds (590-91, 1631-32).

Later on the day following the burglary, Condon and Denisch, both separately and together, met with appellant The thrust of their conversations was essentially the same: Condon was advised by appellant that he would not be permitted to further associate with the Montello gang because of his performance during the burglary. He was also informed that, because of his spendthrift habits, his share would be withheld and periodically distributed to him so as not to attract the attention of the police (656-57).*

At the conclusion of their meeting, Condon requested $1000 from appellant for numerous debts he had incurred. Appellant stated that he did not have the money but agreed to get it for Condon the following night, which he did (657-58). During the next two weeks Condon continued making requests for money from appellant. Before acceding to these requests, appellant would require Condon to account for burglary monies previously given to him (662-69).

Finally, sometime around Christmas, appellant, apparently concerned over Condon's extravagant spending, took Condon for an automobile ride to a deserted pier in Brook-

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* Appellant had confided to Denisch his concern about Condon's lavish spending habits, including what appellant felt was excessive renting of cars (1632-34).

lyn. Denisch was present. Appellant's message to Condon was described by Denisch in his testimony as follows (1642):

> He said, you are renting a different car every day and you are throwing money all over the place and you are going to bring heat on everybody and get everybody caught.
>
> He said Sonny is fed up with you and he just proceeded to call him a lot of names and holler at him and Dennis turned around and said, "Well, you can take my share of the money and stick it," and he said, "I don't want it." He started to insult him.
>
> He said, "You wanted to go to England? You were planning on a trip and you are going to take it now for your own health."

On or about January 2, 1972, Condon flew to England. Before Condon left, appellant gave him $4000 in small denominations. Some of the bills had been burnt. Appellant instructed Condon not to distribute or exchange the money in such a manner as to create suspicion. Having received the $4000, Condon had now received from appellant approximately $8000 of his $14,000 share of the burglary proceeds (673-75, 1643-44).

During this same period of time, Denisch was also receiving from appellant his burglary share in various amounts. By the beginning of February, Denisch had received approximately $8000 of his share. Upon his receiving the last payment, however, appellant told Denisch that there were no burglary monies available. Denisch received no further monies (1665-68).

In the beginning of February, 1972, Condon telephoned appellant from Barcelona, Spain. In just over a month Condon had squandered his funds, and he requested replenishment from appellant (676-77). On February 9, 1972,

appellant sent him a check for $301.50, along with the following typewritten note (Exh. 3):

Feb. 9, 1972

Dear F U C K O—

Knock off the rented cars and high living. This is it from this end, so make it last. DON'T hurry back.

s/Bob

In early March, 1972, Condon returned to the United States and confronted appellant about the note. Appellant explained that there were no more burglary monies available and that Montello had appropriated the balance of his share (682).

The Post-Arrest Meetings with Appellant.

On the day appellant was arrested, July 19, 1972, and over the following month and a half, there were three occasions when appellant was offered an opportunity to cooperate as a witness for the Government. The first occurred shortly after appellant's arrest in a telephone conversation with the Assistant United States Attorney in charge of the case, Peter Schlam. The second occurred one month later, when a meeting was arranged at the United States Attorney's Office between appellant and Condon. The third occurred on September 6, 1972, when Detectives James Rooney and Samuel Rosa, who had been assigned to the case, met with appellant at a restaurant, the Burger Flame, in Brooklyn, pursuant to a telephone conversation with appellant shortly before (35-36, 3017-18, 3058).

According to Detective Rooney, the purpose of the meeting was to "try to convince" appellant to become a Government witness. At the meeting Rooney told appellant that he was "not out to trap cops"; that he wanted to offer appellant "an opportunity to testify for the Government";

and that he "would speak to the Federal Attorney and try to do the best I can for him". Appellant responded: "Well, what can you do for me about the job?" Rooney told appellant that he would bring appellant's cooperation to the attention of his superior officers (3019, 3058-59).

After further discussion, according to Rooney, appellant declined the offer by stating "I can't do it, I can't do it. . . . I'd rather be alive in jail than dead on the street". Detective Rooney testified that appellant never denied his guilt during the meeting, nor did he refuse to cooperate upon the ground that to do so would require giving false testimony (3019-20).

Following the meeting, Detective Rooney's partner, Samuel Rosa who also attended the Burger Flame meeting, filled out a police department "complaint follow-up" form concerning the interview. The report states in part: "No results were obtained from this interview" (380A).

ARGUMENT

POINT I

There was no variance between the proof and indictment.

Appellant contends that there was a fatal variance between Count Four and the proof upon which he was convicted of that charge. Appellant argues that although he was charged with having unlawfully received, for his own personal benefit, approximately $7000 of proceeds from the Manufacturer's burglary on December 14, 1971, the evidence at trial, it is claimed, showed that he acted only "as a future conduit for the shares of Condon and Denisch in which he had no personal interest or stake" during the weeks following the burglary. Without elaboration, appellant offers only the bold conclusion that "Such a variance is substantial and prejudicial and in violation of this appellant's constitutional rights" (Appellant's Brief, pages 7, 14, 19).

Appellant premises this argument on the claim that the hearsay testimony concerning the meeting in Louis Montello's home when the burglary proceeds were divided cannot be considered in determining whether the evidence showed the possession of a portion of the proceeds as charged. Appellant contends that because he was acquitted of the conspiracy, the hearsay evidence which was received through co-conspirators exception should not have been considered by the jury in determining his guilt on Count Four.

This premise was specifically rejected by Judge Neaher in his Memorandum decision (363A-66A). This premise was also rejected by this Court in *United States* v. *Zane*, 495 F.2d 683, 692-93 (2d Cir. 1974), where Judge Mansfield observed:

> Once the court is satisfied by a fair preponderance of independent evidence as to the existence of a joint criminal undertaking, ordinary agency principles per-

> mit hearsay statements of a colleague in furtherance of that enterprise to be admitted on a substantive count that is unaccompanied by any conspiracy count [Citations omitted]. This result is not changed by the inclusion of a conspiracy count or by the jury's acquittal on that conspiracy count [Citations omitted].
>
> Second, the question of the admissibility of hearsay evidence on the substantive and the conspiracy counts was for the judge alone to decide. That determination of admissibility is not altered because the jury later decides to acquit on either of the counts.

See also *United States* v. *Alsondo,* 486 F.2d 1339, 1346-47 (2d Cir. 1973).*

It is understandable that appellant should attempt to extract from consideration the hearsay evidence because this evidence fully supports the inference that appellant received his share of the burglary proceeds.

The hearsay evidence of the Louis Montello meeting showed that the co-defendants had agreed that appellant and Louis Montello were to divide one full share of the burglary proceeds, approximately $14,000; that when burnt bills were set aside Louis Montello stated, "Don't worry, me and Bollella will share that"; that the co-defendants were dissatisfied with Condon's performance during the burglary and that Louis Montello would give appellant the shares of Denisch and Condon, which appellant would, in turn, distribute to them (1628-30).

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* The hearsay testimony was also admissible against appellant as relevant proof of the background operative facts of appellant's role in the burglary venture. *United States* v. *Ruggiero,* 472 F.2d 599, 607 (2d Cir. 1973); *United States* v. *Annunziato,* 293 F.2d 373, 377-78 (2d Cir. 1961).

This evidence in itself would prompt the inference that appellant was to receive his one-half share for his efforts toward the formation of the burglary gang. But the non-hearsay evidence of appellant's conduct following the meeting in Louis Montello's home compels the inference that he had, in fact, received his one-half share, not only for his efforts toward formation of the burglary gang, but for his efforts in distributing the burglary shares to Denisch and Condon.

According to the non-hearsay evidence, appellant on the very next day acknowledged that he had spoken to Louis Montello about the burglary. Appellant told Denisch that he was pleased with the success of the burglary stating, "Good job, well done" but that he had discussed with Louis Montello, Condon's careless performance during the burglary and the displeasure of the co-defendants with Condon's conduct. Appellant also agreed to be responsible for distributing the burglary shares to Denisch and Condon and, for the following three months, appellant did distribute approximately $8000 each to Denisch and Condon (654-58, 673, 1632, 1643-44).*

Based upon the proof of appellant's involvement in the formation of the burglary gang, the agreement among the co-defendants that he was to receive a one-half share of the burglary proceeds, and his own conduct immediately following the burglary, the jury could fairly have inferred beyond a reasonable doubt that appellant received precisely what his associates had designated for him, approximately $7000.

The evidence also shows, as appellant concedes, that appellant had possession of burglary proceeds for the benefit of Denisch and Condon. Judge Neaher found that the

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* According to Condon, the burglary proceeds delivered to him by appellant included some burned bills (673).

evidence was not at variance with Count Four because proof of possession alone would have been sufficient to convict within the meaning of the statute and under the language of the count. In addition, Judge Neaher concluded that although the evidence showed "that he actually did these acts for the benefit of others," this "would not be a material or prejudicial variance." Finally, Judge Neaher asserted that "[n]o meritorious claim of surprise or prejudice is or could be asserted under the circumstances" (360A-63A).

The record fully supports Judge Neaher's finding that no claim of surprise or prejudice could be asserted by appellant. The indictment charged appellant not only as a principal but also as an aider and abettor in violation of 18 U.S.C. § 2. No bill of particulars was requested on behalf of appellant. At the opening of the trial, appellant's counsel was furnished with the Grand Jury testimony of Denisch and Condon which clearly showed appellant's role in distributing their shares of the burglary proceeds. In the opening the prosecutor told the jury that the Government would not only prove appellant had received his share of the burglary proceeds but that he had participated with the co-defendants "in handling the money after the burglary" (72A, 325A-26A, 337A-39A).

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* It would, indeed, be difficult to imagine the possibility that the Government could lawfully conduct a subsequent prosecution of appellant for unlawfully receiving the shares due Denisch and Condon in the face of the judgment of conviction entered in this case, if it was a crime not charged in Count Four. Jeopardy would certainly attach and bar such a prosecution. This in another test to determine whether a fatal variance exists. See *United States* v. *De Pietroantonio*, 289 F.2d 122, 123-24 (2d Cir. 1961).

POINT II

The evidence of the post-arrest meeting between appellant and Detective Rooney was properly admitted into evidence on the Government's rebuttal case.

Simply stated, appellant argues that he was mislead by the prosecutor into believing that the Government's evidence of appellant's post-arrest meeting with Detective Rooney was "exculpatory". Acting upon this mistaken belief, appellant argues that he "probably" would not have testified at trial concerning his version of what had taken place at this meeting (Appellant's Br. pp. 20-23).

A brief review of the proceedings below is necessary to dispose of appellant's meritless claim.

Appellant's counsel had been retained a few days before the trial was scheduled to commence on July 2, 1973. He was furnished with all written reports of contacts with appellant following his arrest. This consisted of two FBI reports and one New York City Police Department report. Although none of these reports contained "statements" made by appellant, the police report contained the conclusory phrase "No results were obtained" because appellant refused to accept an invitation to cooperate as a Government witness (62A-63A, 380A).*

* Appellant's claim that the meeting was held in violation of his right to counsel is without merit. Detective Rooney testified that he had arranged the meeting with appellant, a fellow police officer, over the telephone on the morning of September 6, 1972. Rooney asked appellant if he could speak to him "about his

[Footnote continued on following page]

On the opening day of the trial, appellant's counsel moved to suppress whatever statements had been made by appellant upon the ground that the Government had improperly elicited such statements in violation of his right to counsel. Prior to the hearing on the motion, the Government indicated that it had no intention of introducing any testimony concerning the post-arrest meetings or statements during its direct case even though it considered appellant's conduct and statements "incriminatory." The District Court granted the hearing * (9-13).

The hearing focused primarily on the meeting between appellant and Condon at the United States Attorney's office. Appellant's counsel called FBI Agent Berry and examined him about the meeting. Counsel also made informal inquiries of Schlam concerning the meeting (14-60, 92-94).

When appellant's counsel alleged that statements were obtained at the Burger Flame meeting in violation of appellant's right to counsel, Judge Neaher repeatedly invited appellant's counsel to call either Detective Rooney or Rosa. But counsel continued to focus his inquiry on the meeting in the U.S. Attorney's office between appellant and Condon and did not call either Rooney or Rosa (83-

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position in the case, but that I would not speak about details of this case. I also informed Mr. Bollella that if he had a lawyer he was free to bring the lawyer too" (3018). Appellant testified that after Rooney made the request he telephoned his attorney, but his attorney was not in the office. Appellant nevertheless proceeded to meet Rooney at the Burger Flame restaurant (2842-44). Judge Neaher found in his decision that "it is doubtful whether the statement in question [made by appellant to Rooney] was obtained in violation of defendant's rights under *Massiah* v. *United States*, 377 U.S. 201 (1964)" (369A). Compare *United States* v. *Gaynor*, 472 F.2d 889 (2d Cir. 1973).

* The Government made available for appellant during the hearing the witnesses he had requested including Detectives Rooney and Rosa, FBI Agent Richard Berry, and Assistant U.S. Attorney Peter Schlam (12-13, 92-94).

99). Judge Neaher, eventually decided to close the hearing because it was apparent that counsel was determined to obtain a pre-trial examination of the Government's chief witness, Dennis Condon, and that there did not appear to be a violation of appellant's right to counsel (123-27).

Near the close of the hearing, appellant's counsel asked: "How about the two police officers in the second meeting." Judge Neaher responded that in light of the police report he thought taking testimony would be a waste of time because apparently nothing was obtained from the interview. When the prosecutor sought to remind the Court that the Government considered the evidence incriminatory, he was interrupted by the Judge's inquiry whether the evidence was exculpatory. The prosecutor represented that the evidence was not exculpatory (127-29).

The Government offered no evidence of the post-arrest meetings in its direct case.

Appellant took the stand in his own defense. At the conclusion of his first day on the stand, appellant had not testified about any post-arrest meetings. During a colloquy with the Court and counsel concerning the length of time required to complete the trial, the Government indicated its intention to offer rebuttal evidence should appellant choose to offer testimony as to these meetings (2791, 2793-97).

On the following morning, there was a further colloquy concerning post-arrest meetings. Appellant's counsel conferred in private with co-counsel for the other defendants. Counsel for appellant returned to the courtroom and asked whether the Government would offer the testimony of Peter Schlam, the Assistant United States Attorney, in rebuttal concerning a post-arrest conversation with appellant. The Government responded: "If you go into this whole incident

in the United States Attorney's Office, you may force me to call Schlam, Agent Berry and Condon. . . ." There was no inquiry concerning the Burger Flame meeting. Appellant's counsel then conferred for a second time with co-counsel in private (2801-11).

Following the last conference, and without further discussion, appellant took the stand and resumed his direct testimony. Appellant gave his versions not only concerning his conversations at the United States Attorney's Office, but also with Detective Rooney at the Burger Flame restaurant where appellant claimed that he had declined Rooney's offer to cooperate because it would have required him to give false testimony. To meet this issue, Detective Rooney testified as a rebuttal witness only after the Government made an offer of proof outside the presence of the jury and after an ensuing, lengthy argument before Judge Neaher. This testimony was accompanied by a strong cautionary instruction to the jury (2981-3012, 3029-30).

Thus, when appellant chose to open up the subject of the post-arrest meetings he knew full well that the Government was prepared to offer rebuttal evidence through the testimony of Schlam and Berry concerning the meeting at the United States Attorney's Office.* He further knew that the Government had incriminating evidence of the Burger Flame meeting.

In any event, it can hardly be argued that the Government is responsible for appellant's decision to run the risk of rebuttal evidence when he chose to inject the subject of the post-arrest meetings into the trial. Not even the prospect of being confronted with the conflicting testimoy of an Assistant United States Attorney and an FBI agent

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* Appellant had examined Agent Berry at the pre-trial hearing, and had a memorandum of Schlam's proposed testimony concerning post-arrest conversations with appellant (14-51, 58-60, 92-93, 2801-03).

deterred appellant from injecting these collateral issues into the trial.

The Government should not be taxed for the tactical decision made by appellant. To the contrary, the Government sought to avoid such a collateral issue. At the opening the Government announced it had no intention of offering evidence of the post-arrest meeting on its direct case, and informed appellant that it had no intention of offering it on rebuttal unless appellant's testimony would require it. Once appellant chose to inject the Burger Flame meeting into the trial and offer a reason for his refusal to become a Government witness, Judge Neaher properly ruled that Rooney's testimony could be received for impeachment purposes.

The most that can be said for appellant and his argument is that he was entitled to some clarification from the prosecutor when the report concluding "No results were obtained" was delivered to counsel prior to trial. This clarification was provided counsel before and during the hearing, and during the trial itself, when the prosecutor repeatedly advised counsel that, in the Government's view, the evidence of the post-arrest meetings with appellant was "incriminatory". On appeal appellant argues, incredibly, that the prosecutor represented the post-arrest evidence to be "exculpatory". Appellant's claim that he was conned into testifying on his own behalf must be rejected (3174-75; Appellant's Br. p. 23).

POINT III

Evidence that appellant received $5000 of burglary proceeds from a subsequent burglary was properly received.

Appellant contends that he was denied a fair trial when Government witness Robert Denisch was permitted to testify on redirect examination that he had given appellant $5000 which Denisch had obtained from his participation in the burglary of the Chase Manhattan bank with another gang on April 28, 1972. Appellant argues that the "jury was erroneously permitted to speculate that it was his custom and pattern of this appellant to share in the proceeds of bank burglaries and thereby permitted him to be convicted of sharing in the prior Manufacturer's Hanover loot by proof of having shared in the subsequent Chase Manhattan loot" (Appellant's Brief, page 26).

Judge Neaher properly considered and rejected this contention. It had been a defense theory that Denisch had a motive to falsely implicate others in order to conceal a cash hoard of burglary proceeds from numerous burglaries in which he had participated. Appellant's counsel had a transcript of testimony previously given by Denisch when he appeared as a Government witness in the prosecution arising out of the Chase Manhattan bank burglary.

Using Denisch's testimony from an earlier trial, counsel sought to impeach Denisch's testimony that only $32,000 remained from the Chase Manhattan burglary at the time he was arrested. Appellant sought to show that Denisch had more than $32,000 in his possession and was concealing it (1943-47, 1949-56).

Counsel for co-defendant Santa Maria pursued this same line of questioning on cross-examination and specifically asked (2051):

"Q. Out of the moneys you received out of the Chase Manhattan job in April, you gave $5,000 away, didn't you? A. I did.

"Q. Didn't you give it to Dennis Condon? A. No."

To meet this issue, the Government on redirect sought to show that Denisch did not have possession of more than $32,000 remaining from the Chase burglary at the time of his arrest, and that prior to the arrest he had given appellant, not Condon, $5000 of his share from the Chase burguary. Denisch testified that he told appellant that the $5000 had been proceeds from the Chase burglary (2433-36).

Under these circumstances, it was proper for the Court to allow the witness Denisch to account for some of his burglary share from the Chase burglary. The evidence was not offered to show the appellant's criminal propensity. Here it was offered both to rebut the impression sought to be created on cross-examination, and to show the intimate relationship between Denisch and appellant. Judge Neaher correctly concluded in his decision that the evidence of a subsequent similar act was properly placed before the jury for their consideration (372A).

There was not the slightest indication in the testimony that appellant participated in any way in the Chase burglary. The jury obviously was not prejudiced by the testimony nor did they engage in the speculation that appellant customarily shared in bank proceeds. Appellant was acquitted of the conspiracy count. Appellant's essential claim that he was severely prejudiced by the remark is belied by the jury's divided verdict after long deliberation (3596-3616).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

September 26, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 27th day of September 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Irwin Klein, P.C.
Two Park Avenue
New York, NY 10016

Sworn to before me this
27th **day of** September 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN